No. 10,384

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),

Appellant,

vs.

CLIFFORD C. ANGLIM, United States Collector of Internal Revenue for the First Collection District of California,

Appellee.

On Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

SAMUEL O. CLARK, JR.,
Assistant Attorney General of the United States.

SEWALL KEY,
J. LOUIS MONARCH,
HOMER R. MILLER,
Special Assistants to the Attorney General of the United States.

FRANK J. HENNESSY,
United States Attorney,
Post Office Building, San Francisco,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes and Regulations Involved	2
Statement	3
Summary of Argument	5
Argument:	
The Bank has no right to the refunds because it withheld the taxes from the stockholders	6
Conclusion	14
Appendix.	

Table of Authorities Cited

Cases

	Pages
Allen v. Regents, 304 U. S. 439	12
Bull v. United States, 295 U. S. 247	13
Capital Estates, Inc. v. Commissioner, 46 B. T. A. 986	6, 8
Goodman v. Niblack, 102 U. S. 555	8
Hager v. Swayne, 149 U. S. 242	8
Houston Street Corp. v. Commissioner, 84 F. (2d) 821	8, 12
Lewis v. Reynolds, 284 U. S. 281	10, 13
Pauker v. United States, 23 F. Supp. 821	6, 7
Richards Lubricating Co. v. Kinney, 337 Ill. 122	13
Sage v. United States, 250 U. S. 33	10
Smietanka v. Indiana Steel Co., 257 U. S. 1	10, 11
Standard Oil Co. v. Bollinger, 337 Ill. 353	13
Stone v. White, 301 U. S. 532	13
Tucker v. Alexander, 275 U. S. 228	11
United States v. Felt & Tarrant Co., 283 U. S. 269	11
United States v. Jefferson Electric Co., 291 U. S. 386	11
United States v. Kales, 314 U. S. 186	10
United States v. Nunnally Investment Co., 316 U. S. 258	10
United States ex rel. Girard Co. v. Helvering, 301 U. S. 540	13

Statutes

Internal Revenue Code:	
Sec. 143 (U.S.C. 1940 ed., Title 26, Sec. 143)	2, 5, 6
Sec. 322 (U.S.C. 1940 ed., Title 26, Sec. 322)	6
Sec. 3661 (U.S.C. 1940 ed., Title 26, Sec. 3661)	12
Sec. 3772 (U.S.C. 1940 ed., Title 26, Sec. 3772)	11
Revenue Act of 1938, c. 289, 52 Stat. 447:	
Sec. 143	2, 5, 6, 8, 9, 13
Sec. 322	6

Miscellaneous

Pages

Treasury Regulations 101, promulgated under the Revenue Act of 1938:
- Art. 143-1 v
- Art. 143-9 ..... 11, vii
- Art. 322-2 viii
- Art. 322-3 viii

Treasury Regulations 103, promulgated under the Internal Revenue Code:
- Sec. 19.143-1 v
- Sec. 19.143-9 vii
- Sec. 19.322-2 viii
- Sec. 19.322-3 viii

No. 10,384

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),

Appellant,

vs.

CLIFFORD C. ANGLIM, United States Collector of Internal Revenue for the First Collection District of California,

Appellee.

On Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

OPINION BELOW.

The lower court wrote no opinion.

JURISDICTION.

This is an appeal from the judgment of the United States District Court, Northern District of California, Southern Division, rendered November 6, 1942, in favor of the appellant for $41.73, plus interest, federal

income taxes for the year 1939, collected and paid by the Bank of America as withholding agent. (R. 43-44.) Appellant instituted the action against the Collector of Internal Revenue for the recovery of $6,459.02, plus interest, federal income taxes for the years 1938 and 1939, withheld and paid by it as withholding agent on dividends payable to alien nonresident stockholders of the Transamerica Corporation. (R. 2-23.) Appellant filed claims for refund on July 26, 1941. (R. 5, 8-9.) The claims were rejected by the Commissioner on December 17, 1941. (R. 6, 9.) Jurisdiction was vested in the District Court under Section 24, Fifth of the Judicial Code. Notice of appeal was filed on February 2, 1943. (R. 44-45.) No appeal was taken by the appellee. Jurisdiction is conferred upon this Court by Section 128(a) of the Judicial Code, as amended.

QUESTION PRESENTED.

Whether a withholding agent who pursuant to Section 143(b) of the Revenue Act of 1938, and the Internal Revenue Code, withheld and paid income taxes of nonresident alien stockholders of a corporation out of dividends payable to these stockholders and who withheld the taxes paid from the stockholders, may maintain suit to recover the taxes in its own right.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. i-ix.

STATEMENT.

The undisputed facts as admitted by the pleadings and found by the court may be briefly summarized as follows:

The Bank of America (hereinafter called the Bank) was the transfer agent of Transamerica Corporation having charge and custody of dividend payments to Transamerica's stockholders. (R. 34-35.) On March 15, 1939, the Bank pursuant to Section 143(b), Revenue Act of 1938, filed a withholding tax return reporting income including dividends payable by Transamerica to its nonresident alien stockholders for the year 1938, and withheld and paid the taxes to the Collector of Internal Revenue. (R. 35.) Included in the taxes withheld and paid was the sum of $3,189.83 (R. 35) which the Commissioner of Internal Revenue later ruled was not dividend income to the stockholders. (R. 36.)

On March 15, 1940, the Bank filed a withholding tax return reporting similar income including dividends payable by the same corporation to its nonresident alien stockholders for the year 1939, and also withheld and paid taxes on the income to the Collector. (R. 37-38.) The taxes withheld and paid on the dividends to the nonresident alien stockholders aggregated $3,227.46. (R. 38.) It is admitted by the pleadings that the Commissioner of Internal Revenue later ruled this amount did not constitute dividend income to the stockholders. (R. 8, 27.)

On July 26, 1941, the Bank filed a claim for refund for the tax of $3,189.83, paid for 1938, attaching

thereto a list of about 1,000 nonresident alien stockholders and setting out their names and addresses and the amounts of taxes withheld from each stockholder. (R. 36). On December 17, 1941, the Commissioner rejected the claim for the following reason (R. 37):

> As the tax involved was actually withheld by you from the income paid to the non-resident foreign persons, any excess amounts withheld are refundable only to those recipients upon showing that the amounts withheld were in excess of any properly due for the taxable year. For this reason your claims will be rejected.

On July 26, 1941, the Bank filed a claim for refund of the tax of $3,227.46 paid for 1939, which claim was similar in form to its claim for the year 1938. (R. 38.) On December 17, 1941, the Commissioner rejected this claim for the same reason the claim for 1938 was rejected. (R. 38.)

The Bank withheld taxes from nonresident alien stockholders on dividends paid in 1937 and filed a claim for refund for these taxes which was allowed and the amounts claimed refunded. The Bank thereupon paid the amounts refunded to such stockholders as it could locate and credited the accounts to those to whom checks could not be transmitted. (R. 39.)

After the refund claims for 1938 and 1939 were filed, the Bank set up on its records what it designated as "memorandum credit cards" showing as to each person listed in the refund claims a credit for the amount of the tax for which refund was being claimed for his account. This credit was set up by the Bank only on

subsidiary card records and was considered as a contingent credit which would be transferred to the actual liability accounts of the Bank when and if the refund claims were finally allowed, it being the Bank's purpose and intention to handle any refunds of taxes for 1938 and 1939 in the same manner it handled the 1937 refunds. (R. 39-40.)

SUMMARY OF ARGUMENT.

The Bank did not pay the taxes out of its own funds but withheld them from dividends payable to stockholders of Transamerica. The taxes withheld and paid have never been paid to the stockholders. The Bank has withheld these taxes from the stockholders and not having borne the burden of the tax is not entitled to recover under Section 143(f), Revenue Act of 1938, and the Internal Revenue Code. The taxes involved would be refundable only to the alien stockholders providing they file proper and timely claims for refund and make a showing that the Government is indebted to them upon an audit of their tax liability for the years involved. The provisions of Section 143(f) bar recovery by the Bank in a suit either against the Collector or the United States.

ARGUMENT.

THE BANK HAS NO RIGHT TO THE REFUNDS BECAUSE IT WITHHELD THE TAXES FROM THE STOCKHOLDERS.

The Bank withheld 10% of dividends payable to nonresident alien stockholders of the Transamerica Corporation and paid the amounts withheld to the Collector in compliance with Section 143(d), Revenue Act of 1938, and the Internal Revenue Code. (Appendix, *infra.*) The Commissioner later ruled the dividends were not taxable income. Appellant then filed claims for refund in its own name which were rejected. Appellant now seeks to recover the taxes erroneously paid, in its own right and in its own name. The undisputed evidence shows the taxes were withheld by the Bank from the stockholders and that the stockholders and not the Bank bore the tax burden. It is our position that under Section 143(f), appellant had no right to recover because it withheld the taxes from the stockholders. Section 143(f) provides:

> REFUNDS AND CREDITS.—Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

This section plainly means that refunds shall not be made to the withholding agent where he withholds the taxes from the primary taxpayers. *Pauker v. United States,* 23 F. Supp. 821 (S.D.N.Y.); *Capital Estates, Inc. v. Commissioner,* 46 B. T. A. 986, on appeal to the Circuit Court of Appeals for the Third Circuit.

In the *Pauker* case, *supra,* the court held under provisions of the Revenue Acts of 1934 and 1936, identical with those here involved, that a withholding agent was not entitled to recover where it withheld the tax from the recipients of the income. The court stated (pp. 822-823):

> I think that it is clear that the words "unless the amount of such tax was actually withheld by the withholding agent" mean withheld from the recipient of the income (in this case the foreign authors and publishers). There being no ambiguity, then upon what basis may the petitioner maintain this suit? * * *
>
> * * * * * * *
>
> At bar, I find no statutory authority which would enable the petitioner, as withholding agent, to maintain this suit, nor does there appear from the petition any authority by the foreign authors and publishers to do so.
>
> If what has already been said is not conclusive to defeat the petitioner's right to maintain this action, another ground looms large to the court sufficient to call for the dismissal of the petition. The possibility of subjecting the government to a double liability should defeat the petitioner's right to maintain this action in the absence of a specific statutory authority or some authorization from his principal to sue. If the petitioner were to prevail against the government in this suit, what safeguard would there be against a subsequent suit by the foreign authors and publishers for the same relief? The answer is self-evident. Neither is the court impressed with the argument that no claim for refund by the foreign authors

> and publishers has been made in this case. There is still the possibility of such action on their part in some forum for the identical relief sought here.

Similarly, in the *Capital Estates, Inc.* case, *supra,* it was held that a withholding agent who had withheld the taxes from the primary taxpayer was not entitled to offset an overpayment against its own tax liability.

The appellant mistakenly relies on the case of *Houston Street Corp. v. Commissioner,* 84 F. (2d) 821 (C.C.A. 5th). In that case there had been a failure to withhold and the Commissioner made a jeopardy assessment under Section 143(c) of the applicable Revenue Act. The withholding agent filed a petition with the Board of Tax Appeals for a redetermination of the deficiency, and the question involved was whether the petitioner was the taxpayer and therefore entitled to file a petition before the Board. Since it had not withheld the tax, the statute made the agent itself liable for the tax. Accordingly the court held the agent was "subject to a tax" and entitled to file a petition before the Board. Where, as here, the tax has been withheld and the Commissioner has asserted no claim against the agent, the reasoning of the *Houston* case is inapplicable.

Appellant does not claim an assignment of the claims for refund of the stockholders. If the claims had been assigned before their allowance, such assignment would be void under Section 3477, Revised Statutes. *Hager v. Swayne,* 149 U. S. 242; *Goodman v. Niblack,* 102 U. S. 555. The Bank is clearly not

entitled to the taxes in its own right. It does not allege or prove authority to sue as agent for the stockholders and generally there would be no legal basis for a suit of that character in its name.

On pages 18-19 of its brief appellant states that the purpose of Section 143(f) is to protect the Government against double liability; that the statute of limitations bars any suits for refunds by the stockholders, and consequently the Government would not be in jeopardy of a double liability if the taxes were paid to the Bank. There is nothing in the record showing that the time for filing suits for refund has expired as to any or all of the stockholders. There were about a thousand stockholders and for all the record shows some of them may have filed claims for refund which are still pending before the Commissioner or may be in litigation. The stockholders may have collected their share of the taxes paid. If, as appellant urges, the statute of limitations bars recovery of the taxes by the stockholders, we answer that there is no legal authority for them to indirectly collect barred taxes through appellant as their agent where collection by them in their own names would be prohibited by law on account of the statute of limitations.

The income upon which the tax is levied is the income of the stockholders under Section 143(d). Before any stockholder can recover he must show not only that the amounts withheld were erroneously paid, but that he overpaid his taxes for the year involved. The Commissioner has the right upon a re-audit of the liability of every taxpayer to withhold a refund

unless the tax for the year involved has been paid. *Lewis v. Reynolds,* 284 U. S. 281. In that case, which was a suit for refund against a Collector of Internal Revenue, the Supreme Court quoted with approval the opinion of the Circuit Court of Appeals (p. 283):

> "The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him."

The Court held an overpayment of taxes must appear before there could be a recovery and that has not been shown in the case at bar. There is no legal significance to the statements made by appellant in its brief (p. 18), that it has committed itself to pay any amounts it recovers to the stockholders. Actions to recover taxes must be brought in the name of the party entitled to recover the same and the plaintiff in a suit for refund must establish his right to recover not the right of a third party.

Appellant urges in its brief (pp. 13-16) that since this suit is against the Collector of Internal Revenue it can be maintained even though the suit might not have been proper if brought against the United States. The argument is premised on the ground the sovereign was not sued and that this is a common law action against the Collector which does not require his consent. The only authorities cited in support of this proposition are *United States v. Kales,* 314 U. S. 186; *Sage v. United States,* 250 U. S. 33; *United States v. Nunnally Investment Co.,* 316 U. S. 258; *Smietanka v.*

Indiana Steel Co., 257 U. S. 1. These cases hold that technically the United States is not a party to a suit instituted against the Collector of Internal Revenue, even though the United States actually pays any judgment rendered. Therefore it was held that a judgment against a Collector is not *res judicata* in a suit against the United States.[1]

Those cases do not indicate that a taxpayer may avoid the plain provisions of the Revenue Acts through a suit against the Collector. While it is an alternative remedy, a Collector suit is subject to the same defenses as a suit against the United States. See *United States v. Jefferson Electric Co.*, 291 U. S. 386, 403.

It is well settled that the same prerequisites in the way of filing proper claims for refund must be met whether the suit is against the United States or the Collector. *Tucker v. Alexander*, 275 U. S. 228; *United States v. Felt & Tarrant Co.*, 283 U. S. 269. One of the requirements is that the claimant should show an overpayment of his tax. There is no averment in the claims for refund or the pleadings that the Bank's income taxes for 1938 and 1939 were overpaid. Failure to show that would defeat a recovery even if the Bank had not withheld the taxes from the stockholders.

A tax withheld at the source "is deemed to have been paid by the persons ultimately liable for the tax * * *." Article 143-9, Treasury Regulations 101, *infra*.

---

[1]Section 3772 (d), Internal Revenue Code (Appendix, *infra*, p. i) has abrogated this rule insofar as suits instituted after June 15, 1942, are concerned.

Here the tax was withheld and thus the appellant occupies the status of a tax collector, rather than that of a taxpayer. The statute imposes a *tax* liability on a withholding agent only where he fails to withhold. That was the situation in *Houston Street Corp. v. Commissioner, supra.* But having withheld the tax and assumed the status of a tax collector, appellant was required to pay the money over to the United States, and now has no more standing to claim a refund than any other tax collector. As a mere agent appellant has no interest which can be adverse to the United States or to Collector Anglim.

Partly upon the recognition of the soundness of the principle that a mere collecting agent cannot be hurt by collecting and paying over the tax, and thus has no standing to sue for recovery, the Supreme Court held in *Allen v. Regents,* 304 U. S. 439, 448, 449, that a bill in equity would lie to test *inter alia* the authority of the United States to require state officers to collect federal taxes.

The agency relationship of appellant is further disclosed by Section 3661 of the Internal Revenue Code. (U.S.C. 1940 ed., Title 26, Sec. 3661.) It provides as follows:

> Whenever any person is required to collect or withhold any internal-revenue tax from any other person and to pay such tax over to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner

> and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

Since it appears that the money withheld and paid over to the Collector was a "special fund in trust for the United States," it is clear that the money sought to be recovered did not belong to the appellant. Thus, entirely apart from Section 143(f), we submit that appellant has no standing to maintain this suit.

Appellant's insistence upon the point that this is a personal action against the Collector does not advance its position. Such an action is governed by the broadest equitable principles and consideration of abstract justice. It is settled that a refund will be denied to one not entitled in equity and good conscience to receive it. *United States ex rel. Girard Co. v. Helvering,* 301 U. S. 540, 542; *Stone v. White,* 301 U. S. 532, 534-536; *Bull v. United States,* 295 U. S. 247, 261-262; *Lewis v. Reynolds, supra.* In the absence of a statute, refund of a tax has been denied on the ground that the plaintiff who has shifted the burden of the tax does not come into equity with clean hands. *Richards Lubricating Co. v. Kinney,* 337 Ill. 122; *Standard Oil Co. v. Bollinger,* 337 Ill. 353.

In the light of the admitted fact that appellant has not borne the burden of the tax, these well-settled equitable principles defeat its right to recover.

CONCLUSION.

We therefore respectfully contend that the judgment should be affirmed.

Dated, June 9, 1943.

Respectfully submitted,

SAMUEL O. CLARK, JR.,
Assistant Attorney General of the United States,
SEWALL KEY,
J. LOUIS MONARCH,
HOMER R. MILLER,
Special Assistants to the Attorney General of the United States,
FRANK J. HENNESSY,
United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code:

CHAPTER 37—ABATEMENTS, CREDITS AND REFUNDS

SEC. 3772. SUITS FOR REFUND [As amended by Sec. 503 of the Revenue Act of 1942, Public Law 753, 77th Cong., 2d Sess.]

(a) *Limitations.*

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U.S.C. 1940 ed., Title 26, Sec. 3672.)

Revenue Act of 1938, c. 289, 52 Stat. 447:[2]

[2]The corresponding sections of the Internal Revenue Code are similar and therefore not set out.

SEC. 143. WITHHOLDING OF TAX AT SOURCE.

* * * * * * *

(b) *Nonresident Aliens.*—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien individual a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country: *Provided,* That no such deduction or withholding shall be required in the case of dividends paid by

a foreign corporation unless (1) such corporation is engaged in trade or business within the United States or has an office or place of business therein, and (2) more than 85 per centum of the gross income of such corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of section 119: *Provided further,* That the Commissioner may authorize such tax to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent. Under regulations prescribed by the Commissioner, with the approval of the Secretary, there may be exempted from such deduction and withholding the compensation for personal services of nonresident alien individuals who enter and leave the United States at frequent intervals.

(c) RETURN AND PAYMENT.—Every person required to deduct and withhold any tax under this section shall make return thereof on or before March 15 of each year and shall on or before June 15, in lieu of the time prescribed in section 56, pay the tax to the official of the United States Government authorized to receive it. Every such person is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this section.

(d) INCOME OF RECIPIENT.—Income upon which any tax is required to be withheld at the source under this section shall be included in

the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(e) TAX PAID BY RECIPIENT.—If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be recollected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

(f) REFUNDS AND CREDITS.—Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

SEC. 322. REFUNDS AND CREDITS.

(a) AUTHORIZATION.—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) LIMITATION ON ALLOWANCE.

(1) PERIOD OF LIMITATION.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the

expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) LIMIT ON AMOUNT OF CREDIT OR REFUND.—The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

* * * * * * *

(e) TAX WITHHELD AT SOURCE.—For refund or credit in case of excessive withholding at the source, see section 143(f).

Treasury Regulations 101, promulgated under the Revenue Act of 1938:[3]

ART. 143-1. *Withholding tax at source.*—(a) *Withholding in general.*—Withholding of a tax of 10 percent is required in the case of fixed or determinable annual or periodical income paid to a nonresident alien individual (even though such individual is engaged in trade or business within the United States or has an office or place of business therein) or to a nonresident partnership, composed in whole or in part of nonresident alien individuals, except (1) income from sources without the United States, including interest on deposits with persons carrying on the banking busi-

[3]The corresponding provisions of Regulations 103, promulgated under the Internal Revenue Code, are similar and therefore not set out.

ness paid to persons not engaged in business in the United States and not having any office or place of business therein, (2) interest upon bonds or other obligations of a corporation containing a tax-free covenant and issued before January 1, 1934 (but see paragraph (b) of this article), (3) dividends paid by a foreign corporation unless (A) such corporation is engaged in trade or business within the United States or has an office or place of business therein, and (B) more than 85 percent of the gross income of such corporation for the 3-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States, as determined under the provisions of section 119, (4) dividends distributed by a corporation organized under the China Trade Act, 1922, to a resident of China, and (5) except that such rate of 10 percent shall be reduced, in the case of a resident of a contiguous country, to such rate, not less than 5 percent, as may be provided by treaty with such country. Under the regulations prescribed pursuant to the tax convention between the United States and Canada, the rate of tax to be withheld at the source has been reduced to 5 percent in the case of residents of Canada. (See page 668 of the Appendix to these regulations.)

The tax must be withheld at the source from the gross amount of any distribution made by a corporation, other than a nontaxable distribution payable in stock or stock rights or a distribution in partial or complete liquidation, without regard to any claim that all or a portion of such distribution is not taxable. Appropriate adjustments,

if any, will be made upon the filing of claims for refund.

* * * * * * *

ART. 143-9. *Return of income from which tax was withheld.*—The entire amount of the income from which the tax was withheld shall be included in gross income in the return required to be made by the recipient of the income without deduction for such payment of the tax but any tax so withheld shall be credited against the total income tax as computed in the taxpayer's return. (See, however, article 142-5.) If the tax is paid by the recipient of the income or by the withholding agent it shall not be re-collected from the other, regardless of the original liability therefor, and in such event no penalty will be asserted against either person for failure to return or pay the tax where no fraud or purpose to evade payment is involved.

Tax withheld at the source upon fixed or determinable annual or periodical income paid to nonresident alien fiduciaries is deemed to have been paid by the persons ultimately liable for the tax upon such income. Accordingly, if a person is subject to the taxes imposed by sections 11, 12, 13, or 14, upon any portion of the income of a nonresident alien estate or trust, the part of any tax withheld at the source which is properly allocable to the income so taxed to such person shall be credited against the amount of the income tax computed upon his return, and any excess shall be credited against any income, war-profits, or excess-profits tax, or installment thereof, then due from such person, and any balance shall be refunded.

ART. 322-2. *Credit and refund adjustments.*— Overassessments and overpayments of income taxes will be adjusted by means of certificates of overassessment. Credit or refunds of overpayments on the basis of such certificates of overassessment may not be allowed or made, however, after the expiration of the statutory period of limitation properly applicable unless prior to the expiration of such period a claim therefor on Form 843 has been filed by the taxpayer. The claim, together with appropriate supporting evidence, must be filed in the office of the collector for the district in which the tax was paid. Where an amount of tax in excess of that properly due has been paid by a withholding agent, the credit or refund of such excess amount shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent. (See section 143 (f).) As to interest in case of credits or refunds, see section 614 of the Revenue Act of 1928, as amended by section 804 of the Revenue Act of 1936 (paragraph 42 of the Appendix to these regulations), and section 177, United States Judicial Code, as amended by section 615 of the Revenue Act of 1928 and section 808 of the Revenue Act of 1936 (paragraph 43 of the Appendix to these regulations).

ART. 322-3. *Claims for refund by taxpayers.*— Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843, and should be filed with the collector of internal revenue. A separate claim on such form shall be made for each taxable year or period.

The claim must set forth in detail and under oath each ground upon which a refund is claimed,

and facts sufficient to apprise the Commissioner of the exact basis thereof. No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim thereof except upon one or more of the grounds set forth in a claim filed prior to the expiration of such period. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund. With respect to limitations upon the refunding or crediting of taxes, see article 322-7.